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Supreme Court of the United States

October Term, 1958

No. 378

ANONYMOUS NOS. 6 AND 7,
Appellants,

v.

HON. GEORGE A. ARKWRIGHT, as Justice of the Supreme Court of the State of New York.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANTS

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INDEX

Table of Cases Cited

Other Authorities Cited

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BRIEF FOR APPELLANTS

Appellants Howard Bluestein (described above as Anonymous No. 6) and Neal Percudani (described above as Anonymous No. 7) appeal from the final orders of the Court of Appeals of the State of New York, dated and entered in the office of the Clerk of said Court of Appeals on June 25, 1958, dismissing, upon the ground that no substantial constitutional question is involved, their appeals taken on constitutional grounds from final orders of the Appellate Division of the Supreme Court of the State of New York, Second Department, dated and entered in the Appellate Division Clerk's office on May 26, 1958, which confirmed the determinations and mandates made at the Additional Special Term, Kings County (for a Judicial Inquiry by the Court into Certain Alleged Illegal, Corrupt and Unethical Practices and of Alleged Conduct Prejudicial to the Administration of Justice by Attorneys and Counselors-at-law, and by Others Acting in Concert

with Them, in the County of Kings), dated and entered in the office of the Clerk of Kings County, State of New York, on April 24, 1958, adjudging each appellant guilty of a criminal contempt of court and appellants submit this brief to show that the Supreme Court of the United States has jurisdiction and that their Fourteenth Amendment due process rights to representation by counsel have been violated.

Opinions Below

The memoranda decisions of the Court of Appeals of the State of New York are reported in 4 N. Y. 2d 1034; 177 N. Y. S. 2d 687; 152 N. E. 2d 651. The Memoranda decisions of the Appellate Division of the Supreme Court of the State of New York, Second Department, are reported in 6 A. D. 2d 719 (2 and 3); 176 N. Y. S. 2d 227, 228.

Jurisdiction

These were original petitions (R. 130, 140) in the Appellate Division to review the determinations and mandates made at the Additional Special Term (Judicial Inquiry), convicting each appellant of a criminal contempt of court for refusing, after being sworn and in the immediate view and presence of Mr. Justice Arkwright, the appellee, a justice of the Supreme Court, to answer questions put to him, in violation of Sections 750(5), 751, Judiciary Law of the State of New York (McKinney's Consolidated Laws of New York, Book 29). Each appellant was sentenced to thirty days imprisonment (R. 11, 41). Each served two days and is presently enlarged on bail in the sum of $2500. "Such" determinations and mandates are "reviewable by a proceeding under article seventy-eight of the civil practice act", Section 752, Judiciary Law. Section 1287 of Article 78 of the Civil Practice Act (Gilbert-Bliss, Civil Practice Act of New York), provides that if the

petition be directed against a justice of the Supreme Court, the application shall be made to the Appellate Division in the first instance.

The petitions made the claim that appellants were denied Fourteenth Amendment, United States Constitution, due process of law, in that they were denied the presence of their counsel in the hearing room during the questioning (R. 132, 142).

Relying upon the companion case of *Matter of Anonymous (M.)* v. *Arkwright* (5 A. D. 790, leave to appeal denied, 4 N. Y. 2d 676), the Appellate Division confirmed the determinations and mandates of the appellee.

In the companion case, the right to exclude counsel from the hearing room during questioning was expressly based by the Appellate Division on its construction of Section 90, subdivision 10, of the Judiciary Law. The Judicial Inquiry was conducted by order of the Appellate Division. In the companion case, the Appellate Division wrote (5 A. D. 2d 790):

> "The order also provided that 'for the purpose of protecting the reputation of innocent persons, the said inquiry and investigation shall be conducted in private, pursuant to the provisions of the Judiciary Law (Section 90, subdivision 10); * * *.' It was not an abuse of discretion for the additional Special Term to exclude petitioner's attorney from the room while petitioner was being questioned, nor was it a violation of his constitutional rights (*People ex rel. McDonald* v. *Keeler*, 99 N. Y. 463; *Matter of Groban*, 352 U. S. 330; Judiciary Law, Sec. 90)."

Thereupon, appellants appealed as of right to the Court of Appeals of the State of New York, the highest state court. Their appeals were taken pursuant to the provisions of Section 588, subdivision 1, (a), Civil Practice Act, which allows an appeal as of right where a federal constitutional question is involved.

By the orders dated and entered in the office of the Clerk of the Court of Appeals on June 25, 1958, that court on appellee's motion dismissed the appeals, expressly, "upon the ground that no substantial constitutional question is involved" (R. 161, 162).

Each appellant filed a notice of appeal herein with the Clerk of the Court of Appeals on July 25, 1958 (R. 163, 166).

Each appellant also filed a notice of appeal herein with the Clerk of the Appellate Division, Second Department, on July 24, 1958, because the latter is possessed of part of the record required for review by this Court (R. 169, 172).

The jurisdiction of this Court to review these cases by direct appeal is invoked under 28 U. S. C., Section 1257(2).

Failing that, appellants invoke this Court to treat the papers as applications for writs of certiorari under 28 U. S. C., Section 2103.

Further consideration by this Court of the question of jurisdiction was postponed to the hearing of the case on the merits (R. 174), 79 S. Ct. 151.

The Constitutional Provision and Statute Involved

Fourteenth Amendment:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". The Constitution of the United States of America (Government Printing Office, 1924, p. 29)

Subdivision 10, Section 90, Judiciary Law of the State of New York, which may be found in McKinney's Con-

solidated Laws of New York, Annotated, Book 29, reads, as follows:

> "SEC. 90. *Admission to and removal from practice by appellate division*
>
> • • •
>
> 10. Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

Questions Presented

Whether Section 90, subdivision 10, of the Judiciary Law of the State of New York, in so far as it provides that "any inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and deemed private and confidential", as con-

strued and applied in these cases, is unconstitutional in that it denied Fourteenth Amendment, United States Constitution, due process of law to appellants who are not attorneys at law and who had been told before their questioning by a member of the Inquiry staff that evidence of a prima facie case of crime had already been gathered and was ready to be sent to the District Attorney for prosecution and who nevertheless were denied the presence of their counsel in the courtroom during the questioning as a result of which the appellants refused to answer certain questions?

Whether the judgment on appeal in the circumstances stated in the previous question denied to appellants such due process?

Statement

The Judicial Inquiry was conducted by Mr. Justice Arkwright under an order made by the Appellate Division (R. 27). The scope of the inquiry and the main provisions of the order were thus summarized by the Appellate Division in the companion case (5 A. D. 2d 790-791):

> "By an order of this court dated January 21, 1957, as amended by subsequent order dated February 11, 1957, a judicial inquiry and investigation was directed with respect to the improper practices and abuses by attorneys in Kings County and by persons acting in concert with them, as alleged in the petition of the Brooklyn Bar Association. In part, the order directed inquiry with respect to practices 'involving professional misconduct, fraud, deceit, corruption, crime and misdemeanor, by attorneys and by others acting in concert with them' and with 'respect to any and all conduct prejudicial to the administration of justice by attorneys and others acting in concert with them.' The order appointed an additional Special Term of the Supreme Court to conduct the inquiry and investigation and provided that the inquiry and investigation shall be

conducted by a named Justice of the Supreme Court, 'with full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records'. An attorney nominated by the Brooklyn Bar Association was designated to aid said Justice in the conduct of the inquiry and in the prosecution of said investigation. The order also provided that 'for the purpose of protecting the reputation of innocent persons, the said inquiry and investigation shall be conducted in private, pursuant to the provisions of the Judiciary Law (Section 90, subdivision 10); that all the facts, testimony and information adduced, and all papers relating to this inquiry and investigation, except this order, shall be sealed and be deemed confidential; and that none of such facts, testimony and information and none of the papers and proceedings herein, except this order, shall be made public or otherwise divulged until the further order of this court' and 'that upon the conclusion of said inquiry and investigation the said Justice shall make and file with this court his report setting forth his proceedings, his findings and his recommendations.'"

What is done with the evidence adduced at the Judicial Inquiry was thus described in Mr. Justice Arkwright's report to the Appellate Division on June 11, 1958 (R. 153):

> "Your Court has also permitted Mr. Hurley and me to refer the evidence adduced at the Additional Special Term regarding 10 attorneys to the District Attorney of Kings County for possible criminal prosecution as well as for mandatory disciplinary proceedings. The District Attorney has initiated disciplinary proceedings against two (2) of these attorneys. In addition, a Kings County Grand Jury has returned an indictment for grand larceny against another attorney. Furthermore, your Honorable Court has authorized Mr. Hurley and myself to refer the facts which have been elicited at the Additional Special Term concerning the activities of certain doctors to the State Board of Regents for proper action."

Appellants were subpoenaed to appear and testify at the Judicial Inquiry (R. 60-61). Failure to appear or testify is punishable as a contempt of court.

Appellants are not attorneys-at-law (R. 65, 79). They are licensed private detectives and investigators (R. 138, 148). They do business as partners under the trade name of Gotham Claims Bureau (R. 61).

Appellants repeatedly protested to Mr. Justice Arkwright that they were being questioned as persons themselves accused of crime, not as mere witnesses, and that the accusation had been made by a member of the staff of the Judicial Inquiry. (R. 72, 73, 79, 85, 87).

Mr. Justice Arkwright held a hearing on this. Here is the text of the admissions of the staff member in question, with italics supplied (R. 115-116):

> "*By the Court*:
>
> Q. You heard what was said. Do you wish to say anything? A. My recollection of the facts as they took place on December 4th was that following Mr. Zangara being before the Court and asking for an adjournment, that he and his clients approached me in the outer foyer outside the courtroom and Mr. Zangara, as spokesman for the group, asked me exactly what was wanted of his clients in this matter. I, at that time, told Mr. Zangara that all—I don't know my exact language, but *I indicated that we did not intend to pussyfoot with them,* we were not trying to trap them in any manner, but *that testimony and evidence had come before us in the course of our investigation that someone in the employ of the Gotham Claims Service had,* with some frequency, *obtained statements from defendants,* holding themselves out to be from the defendant's carrier and also holding themselves out to be from other agencies, and in one instance the district attorney's office. *That our investigation had disclosed that these statements had been tampered with, and that it was relative to this that we wished to speak to*

them to find out if these statements were actually taken by the Gotham Claims Service, for what attorneys these statements were taken, and whether the tampering was done by them or their employees or at the direction of some attorney.

I told Mr. Zangara that the interests of the Judicial Inquiry was primarily directed at the attorneys that they had done business with, that if they cooperated fully I felt that the Court would take that into consideration if something unethical had been done.

I further stated that in my opinion there was prima facie evidence in the event that the clients decided to plead the Fifth Amendment, to refer this matter to the district attorney.

I stated it was my opinion, I did not indicate that that would be done, I did not indicate that it was even being considered at the time. I was merely giving my opinion for which they had asked. I made it quite clear that this was all off the record, that they were asking what amounted to a favor, and I was being very frank and honest with them. And I was thanked for indicating to them what the picture was.

That is to my knowledge the full extent of the conversation.

In fact, I remember indicating that any final action on the matter would have to be on the part of your Honor and that the Appellate Division would finally rule as to what would actually be done."

Facing such imminent peril of prosecution for crime, appellants requested that their counsel be permitted in the courtroom during the questioning.

As to each appellant, the Appellate Division found that: "Refusal to answer was on the sole ground that petitioner's attorney was not permitted to be present in the hearing room during the interrogation" (R. 138, 148), 6 A. D. 2d 719.

Appellants' attorney made it clear to Mr. Justice Arkwright that the claim to the right of counsel during ques-

tioning was made "under the due process clause of the Fourteenth Amendment" (R. 89).

The same claim was made by each appellant in his petition to the Appellate Division to review the determinations and mandates made by Mr. Justice Arkwright (R. 131, 132, 141, 142).

In the companion case, the Appellate Division had rested its approval of Mr. Justice Arkwright's exclusion of counsel squarely on its application of subdivision 10, Section 90, Judiciary Law, which provides that any such inquiry shall be "private and confidential," 5 A. D. 2d 790. In his answer to the petition in the Appellate Division of each appellant herein Mr. Justice Arkwright stated that he excluded counsel from the hearing room during questioning in order to maintain that "privacy" (R. 136, 146). As to each appellant, the Appellate Division held that the companion case was conclusive, and wrote (R. 138, 148), 6 A. D. 2d 719:

> "Petitioner contends that special facts distinguish this proceeding from *Matter of Anonymous* (*M.*) v. *Arkwright* (5 A. D. 2d 790, motion for leave to appeal denied 4 N. Y. 2d. 676) and *Matter of Anonymous* (*S.*) v. *Arkwright* (5 A. D. 2d 792) in that petitioner, prior to being called to testify, was informed that he was being called not merely as a witness but that he was being investigated and that sufficient evidence was already available to warrant presentation thereof to a Grand Jury or District Attorney. Determination unanimously confirmed, without costs."

Summary of Argument

The reservation on the question of jurisdiction in this Court's order of November 17, 1958 (R. 174) is not crucial. Postponement of further consideration of the question of jurisdiction *to the hearing of the case on the merits* apparently implies that the constitutional questions presented

are substantial and important and should be decided either on this appeal or by grant of certiorari if for technical reasons appeal does not lie.

As a technical matter appeal does lie here. The New York Appellate Division construed the state statute to authorize the exclusion of counsel and the New York Court of Appeals in effect affirmed that ruling. Thus the purpose of the technical requirements for direct appeal has been met, namely, that the highest state court should be apprised of the challenge to the constitutionality of the statute on federal grounds and should have had an opportunity to construe the statute, *Wilson* v. *Cook*, 327 U. S. 474, 480.

At any rate, this Court can grant certiorari on the instant papers, U. S. C., Section 2103, and proceed to decision on the merits on that basis. Cf. *Sweezy* v. *State of New Hampshire by Wyman*, 354 U. S. 234, 236.

Matter of Groban, 352 U. S. 330, a five-to-four decision, was misapplied by the courts below. Exclusion of counsel from investigation of the causes of a fire by a fire marshal (*Groban*) cannot be equated with the exclusion of counsel in the instant Judicial Inquiry conducted by a Justice of the New York State Supreme Court in the calm atmosphere of a courtroom and with a large staff of counsel on one side.

The reasons upon which the prevailing view proceeded in *Groban* do not pertain here.

In *Groban* the appellants believed that "suspicion" was entertained against them, "without allegations of fact to support such belief" (p. 333). Here it stands admitted in the record that appellants had already been accused of crime by a member of the Inquiry staff.

In *Groban* it was held that "abuses" may be "corrected", for example, "by excluding from subsequent prosecutions evidence improperly obtained" (p. 334). No such

possibility of correcting abuses exists here. This evidence was taken by a "court".

In *Groban*, it was held that the presence of "advisors" might easily so far "encumber" a proceeding as to make it "unworkable or unwieldy" (p. 334). That does not apply here for two reasons: (1) counsel here would be in a "court", subject to all restraints and disciplines that a court can impose; and (2) the order for the Inquiry did not exclude the presence of counsel in all cases. There was "discretion" to allow it for one who was "himself a subject of the inquiry as to his own acts" (5 A. D. 790, 791). The question here therefore is whether the presence of counsel is a matter of constitutional right or one of mere discretion. There is no question here of counsel's presence rendering the inquiry "unworkable or unwieldy."

These are vital differences. In the concurring opinion in *Groban*, Mr. Justice Frankfurter wrote (p. 337):

> "The Due Process Clause does not disregard vital differences. If it be said that these are all differences of degree, the decisive answer is that recognition of differences of degree is inherent in due regard for due process."

Grand jury procedure is not analogous. "They have no axes to grind and are not charged personally with the administration of the law," dissenting opinion of Mr. Justice Black in *Groban*, p. 347.

The privilege against self-incrimination does not constitute a substitute. The existence of one constitutional privilege is no warrant for denial of another. "And in view of the intricate possibilities of waiver," especially these appellants who are not lawyers "may easily unwittingly waive it," dissenting opinion of Mr. Justice Black in *Groban*, p. 346.

Crooker v. *California*, 357 U. S. 433, and *Cicenia* v. *La Gay*, 357 U. S. 504, are also not in point. They hold,

five-to-four and five-to-three, that the bare fact of a refusal by state authorities to honor a request to confer with counsel about to be retained or already retained during a period of police interrogation is of itself no violation of due process and of itself does not invalidate an otherwise *voluntary* confession so as to exclude it from evidence at the ensuing trial. Such denial of counsel, it was held, was an element of coercion to be shown against admission of the confession in evidence at the trial. Here the evidence was *not* to be *voluntary*. It was being coerced under pain of contempt. Once given to the "court", there would be no further opportunity to correct the abuse of the denial of counsel.

The fact that here Mr. Justice Arkwright on special occasion did allow appellants to leave the courtroom to consult counsel (R. 66) only emphasizes the violation of their rights. He was evidently satisfied that appellants needed the guiding hand of counsel. There can be no effective representation except in the courtroom. Appellants, who are not lawyers and who were laboring under tension of accusation of crime, could not possibly inform counsel outside with the equivalent of his own hearing and seeing. In addition, the mere presence of counsel is assurance against oppression.

The right to representation by counsel does not begin only at the "trial", but also at "any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an abuse of 'that fundamental fairness essential to the very concept of justice' ", *Crooker*, page 439. Denial of counsel here was in every realistic sense an effective denial of counsel at any subsequent trial.

POINT I

The case is ripe for decision on this appeal or by grant of certiorari if for technical reasons appeal does not lie.

Appellee moved to dismiss the appeal on two grounds: (1) that appeal does not lie here because the unconstitutionality of the state statute was not properly raised in the New York courts and (2) that no substantial constitutional question is presented.

Appellants opposed the motion to dismiss on the grounds (1) that appeal does lie here because the constitutionality of the statute was decided by the New York courts and (2) that a substantial and important constitutional question is involved which, failing appeal on technical grounds, ought in any event to be reviewed on the merits by grant of certiorari.

In those circumstances this Court's order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 174) would seem to reserve only the method for a decision on the merits, whether by this appeal or by grant of certiorari. In other words, this Court seemingly was satisfied that a substantial and important constitutional question is involved which should be decided on the merits, one way or the other.

Appeal

In *Matter of Groban*, 352 U. S. 330, this Court wrote (pp. 331-332):

> "The Ohio Supreme Court construed Section 3737.13 to authorize the Fire Marshal to exclude appellants' counsel from the proceeding. Since appellants' attack is on the constitutionality of that section, we have jurisdiction on appeal."

The instant case is substantially similar. Here, too, appellants attack the constitutionality of the applicable

part of subdivision 10, section 90, Judiciary Law of the State of New York. Here, too, the New York courts construed that statute to authorize the exclusion of counsel. As already appears, the instant case was decided upon the authority of the companion case. In the companion case (5 A. D. 2d 790, leave to appeal denied, 4 N. Y. 2d 676) the Appellate Division wrote (5 A. D. 790):

> "The order also provided that 'for the purpose of protecting the reputation of innocent persons, the said inquiry and investigation shall be conducted in private, pursuant to the provisions of the Judiciary Law (Section 90, subdivision 10); * * *.' It was not an abuse of discretion for the additional Special Term to exclude petitioner's attorney from the room while petitioner was being questioned, nor was it a violation of his constitutional rights (*People ex rel. McDonald* v. *Keeler*, 99 N. Y. 463; *Matter of Groban*, 352 U. S. 330; Judiciary Law, Sec. 90)."

The dismissals by the New York Court of Appeals "upon the ground that no substantial constitutional question is involved" (4 N. Y. 2d 1034) were in effect affirmances of the Appellate Division on the merits, *Tumey* v. *Ohio*, 273 U. S. 510; *Matthews* v. *Huwe*, 269 U. S. 262.

The only distinction between the quotation from *Groban* and the instant case is that here the New York Court of Appeals did not itself write the decision which construed the statute as authorizing the exclusion of counsel, but in effect affirmed that construction by the Appellate Division. That, it is submitted, is a distinction without a difference. Substantially the situations are the same.

"The purpose" of the highest-state-court-requirement on an appeal to this court based upon repugnancy of a state statute to federal law is that the highest state court should be "apprised" in order that the highest state court should have an "opportunity authoritatively to construe" the state statute, *Wilson* v. *Cook*, 327 U. S. 474, 480. That purpose was fully served here. The New York Court of Ap-

peals was apprised by the Appellate Division decision that part of subdivision 10, section 90, of the Judiciary Law, has been construed and applied so as to deny counsel in the teeth of a claim of federal due process. It had an opportunity authoritatively to construe the statute. Indeed, it did so by in effect affirming the decision of the Appellate Division.

In *People of the State of New York* v. *Zimmerman*, 278 U. S. 63, this Court wrote upon the subject, as follows (p. 67, emphasis supplied):

> "*There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States.* No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. *And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.*
>
> "Of course the decision must have been against the claim of invalidity, *but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough.*"

The motion to dismiss states that appellants did not attack the constitutionality of the statute in the New York courts and cites *Wilson*. In *Wilson* it was held (p. 480) that in order to support an appeal to this court it must appear that the validity under federal law of the state statute, as construed and applied, "has either been presented for decision to the highest court of the state (citations), *or* has in fact been decided by it (citations)" (emphasis supplied).

Since, as already appears, the situation herein is the substantial equivalent of a construction by the New York

Court of Appeals that the instant statute authorized the exclusion of counsel, it is of no significance that appellants did not attack the constitutionality of the statute in the New York courts. The appeal lies under the second of the alternatives quoted from *Wilson*.

Certiorari

Should this Court find that for failure to attack the constitutionality of the statute in the New York courts appeal is not available, then certiorari should be granted on the instant papers, 28 U. S. C., Section 2103, and decision should then proceed by that method. Cf. *Sweezy* v. *State of New Hampshire by Wyman*, 354 U. S. 234, 236.

POINT II

Exclusion of appellants' counsel from the courtroom during their questioning denied them Fourteenth Amendment due process.

The judgments on appeal were based upon a misapprehension of the reach of this Court's decision in *Matter of Groban*, 352 U. S. 330.

In the companion case the Appellate Division relied upon *Groban*, 5 A. D. 2d 790, 791, and decided the instant cases upon the authority of the companion case, 6 A. D. 2d 719. The other case cited by the Appellate Division from 5 A. D. 2d 792, has no bearing upon the questions herein presented. There the Appellate Division reversed the contempt upon another ground.

In *Groban*, this Court held that a statute permitting a state fire marshal to conduct private investigation to determine causes of fire, insofar as it authorizes exclusion of counsel while witness testifies, is not repugnant to due process.

There were three opinions in *Groban*: a majority opinion of three written by Mr. Justice Reed; a concurring opinion by Mr. Justice Frankfurter, with whom Mr. Justice Harlan joined; and a dissent by Mr. Justice Black, with whom the Chief Justice and Justices Douglas and Brennan joined.

There are several significant grounds upon which the instant cases differ from the majority opinion.

Mr. Justice Reed wrote (p. 333):

> "The mere fact that suspicion may be entertained of such a witness, as appellants believed existed here, though without allegation of facts to support such belief, does not bar the taking of testimony in a private investigatory proceeding."

In the instant cases it is not a matter of "suspicion" only by the authorities and not a mere "belief" by appellants without allegations of fact to support it. Here it stands admitted on the record that before appellants were questioned they had been told by a member of the Inquiry staff that sufficient evidence had already been gathered against them of a *prima facie* case of *crime* that was ready to be sent to the District Attorney.

Mr. Justice Reed further wrote (334):

> "Possibility of improper exercise of opportunity to examine is not in our judgment a sound reason to set aside a State's procedure for fire prevention."

There is here no such attendant urgency as that involved in investigating the cause of a fire. This inquiry is conducted by a Justice of the Supreme Court in the calm atmosphere and with all the paraphernalia of a courtroom and with a large staff of counsel on one side. The power exercised here is not administrative, but judicial. The punishment here was meted out by a "court" for "refusal * * *; after being sworn, to answer any legal and proper

interrogatory". See Judiciary Law, Section 750, subdivision 5. A court is the one place in the world where a person accused should not be denied counsel.

Mr. Justice Reed further wrote (p. 334):

> "As in similar situations abuses may be corrected as they arise, for example, by excluding from subsequent prosecutions evidence improperly obtained."

Here there would be no possibility of correcting any such abuse. Here the evidence is taken by a "court". There is no conceivable basis upon which evidence so taken may be excluded from subsequent prosecutions. Unless the parties have the guiding hand of counsel at the time the evidence is first given, they are forever deprived of correcting any abuse that may be involved.

Finally, Mr. Justice Reed wrote (p. 334):

> "Ohio, like many other States, maintains a division of the state government directed by the Fire Marshal for the prevention of fires and reduction of fire losses. Section 3737.13, which has been in effect since 1900, represents a determination by the Ohio Legislature that investigations conducted in private may be the most effective method of bringing to light facts concerning the origins of fires, and, in the long run, of reducing injuries and losses from fires caused by negligence or by design. We cannot say that this determination is unreasonable. The presence of advisors to witnesses might easily so far encumber an investigatory proceeding as to make it unworkable or unwieldy."

No such possibility exists here. Counsel for persons questioned here would be in a "court", subject to all restraints and disciplines that a court can impose. Indeed the order for the Inquiry here did not exclude the presence of counsel for persons questioned in all cases. In the companion case, 5 A. D. 2d 790, the Appellate Division wrote (p. 791):

> "In its discretion the additional Special Term might have permitted petitioner's attorney to be present while petitioner was being questioned, since it is clear that he was not merely a witness as to improper conduct of others but was himself a subject of the inquiry as to his own alleged acts of professional misconduct."

The question here, therefore, is not one of the presence of counsel to the person examined encumbering the proceeding so as to make it unworkable or unwieldy. The presence of such counsel in exceptional cases was envisioned in the order itself.

The question here is whether the presence of such counsel is a matter of constitutional right or of mere "discretion". In the companion case the Appellate Division wrote that the person examined was himself the subject of inquiry as to his own alleged "acts of professional misconduct". A distance separates "professional misconduct" by a lawyer from crime. *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465. In the cited case, Chief Judge Cardozo wrote (p. 470):

> "The precise question to be determined is whether there is power in the Appellate Division to direct a general inquiry into the conduct of its own officers, the members of the bar, and in the course of that inquiry to compel one of those officers to testify as to his acts in his professional relations. The grand jury inquires into crimes with a view to punishment or correction through the sanctions of the criminal law. There are, however, many forms of professional misconduct that do not amount to crimes."

Here, appellants were asked to testify after they had already been informed by a member of the Inquiry staff that a *prima facie* case of *crime* had already been established against them and was ready to be sent to the District Attorney for prosecution. Here, the presence of their

counsel during the questioning was a constitutional right of due process.

The instant cases also differ from the concurring opinion in *Groban*.

Mr. Justice Frankfurter there wrote that the Ohio statute was not directed to the "examination of suspects" (p. 336). Here, before the examination, the appellants had already been accused of crime. Mr. Justice Frankfurter further wrote that in *Groban* there was an "administrative inquiry * * * *in camera*" (p. 336). Here there was a judicial inquiry in court. Lastly, Mr. Justice Frankfurter wrote (p. 337):

> "The Due Process Clause does not disregard vital differences. If it be said that these are all differences of degree, the decisive answer is that recognition of differences of degree is inherent in due regard for due process."

Here there are differences from *Groban* and they are vital and should be recognized so as to accord to appellants due process.

The four dissenters in *Groban* were of opinion that even on the facts of that case there was a denial of due process. They thought that even *Groban* (p. 338)

> "disregards 'this nation's historic distrust of secret proceedings' and decides contrary to the general principle laid down by this Court in one of its landmark decisions that an accused ' * * * requires the guiding hand of counsel at every step in the proceedings against him'."

Descending to the particulars of the *Groban* case, Mr. Justice Black wrote (p. 344):

> "I also firmly believe that the Due Process Clause requires that a person interrogated be allowed to use legal counsel whenever he is compelled to give testimony to law-enforcement officers which

> may be instrumental in his prosecution and conviction for a criminal offense. This Court has repeatedly held that an accused in a state criminal prosecution has an unqualified right to make use of counsel at every stage of the proceedings against him. The broader implications of these decisions seem to me to support appellants' right to use their counsel when questioned by the Deputy Fire Marshal. It may be that the type of interrogation which the Fire Marshal and his deputies are authorized to conduct would not technically fit into the traditional category of formal criminal proceedings, but the substantive effect of such interrogation on an eventual criminal prosecution of the person questioned can be so great that he should not be compelled to give testimony when he is deprived of the advice of his counsel. It is quite possible that the conviction of a person charged with arson or a similar crime may be attributable largely to his interrogation by the Fire Marshal. The right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by pretrial examination."

Then, answering a suggestion that the privilege against self-incrimination is ample protection, he wrote (pp. 345-346):

> "The average witness has little if any idea when or how to raise any of his constitutional privileges. There is no requirement in the Ohio statutes that the fire-prevention officers must inform the witness that he is privileged not to incriminate himself. And in view of the intricate possibilities of waiver which surround the privilege he may easily unwittingly waive it. If the witness is coerced or misled by his interrogators he may not dare to raise the privilege. Undoubtedly he will be made aware that hanging over his head at all times is the officer's power to punish him for contempt—a power whose limitations the witness will not understand."

Answering a suggestion that grand jury procedure is relevant, he further wrote (pp. 346-347):

"But any surface support the grand jury practice may lend disappears upon analysis of that institution. The traditional English and American grand jury is composed of 12 to 23 members selected from the general citizenry of the locality where the alleged crime was committed. They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury."

Mr. Justice Black concluded thus (p. 353):

"Modern as well as ancient history bears witness that both innocent and guilty have been seized by officers of the state and whisked away for secret interrogation or worse until the groundwork has been securely laid for their inevitable conviction. While the labels applied to this practice have frequently changed, the central idea wherever and whenever carried out remains unchanging—extraction of 'statements' by one means or another from an individual by officers of the state while he is held incommunicado."

Two more cases on the right to counsel decided by this Court at end of term require comment.

Crooker v. *California*, 357 U. S. 433, and *Cicenia* v. *La Gay*, 357 U. S. 504, held that the bare fact of refusal by state authorities to honor a request to confer with counsel about to be retained or already retained during a period of police interrogation is of itself no violation of due process. There was division in both, five to four and five to three, Mr. Justice Brennan abstaining in the latter.

These cases also do not reach the questions presented by the instant cases.

In *Cicenia,* this Court held that the claim of right to confer with counsel there had been "disposed of by *Crooker*", 357 U. S. 508.

In *Crooker,* the questions presented were thus stated by this Court (p. 434):

> "Petitioner, under sentence of death for murder of his paramour, claims that his conviction in a California court violates Fourteenth Amendment due process of law because (1) the confession admitted into evidence over his objection had been coerced from him by state authorities, and (2) even if his confession was voluntary it occurred while he was without counsel because of the previous denial of his request therefor."

This Court there found that the confession was "voluntary" (p. 438). The Court pointed to the evidence that (p. 437):

> "Before being transferred to the West Los Angeles Police Station he was advised by a police lieutenant, 'you don't have to say anything that you don't want to,' * * *."

Then this Court there disposed of the second contention (p. 439):

> "that the use of any confession obtained from him during the time of such denial would itself be barred by the Due Process Clause, even though freely made. We think petitioner fails to sustain the first point, and therefore we do not reach the second."

In other words, this Court there held that such denial of counsel may be an element of coercion which may be shown at the trial in impeachment of the voluntariness of the confession.

In both respects the instant cases differ from the last cited cases. Here the evidence was not to be "voluntary".

Appellants were under coercion of subpoena on pain of contempt to give their evidence. Here, moreover, there would be no way of correcting any abuse of their rights at a subsequent prosecution. The evidence, it has already been shown, would be taken by a "court" and unless appellants have the guiding hand of counsel at the time the evidence is first given, they would forever be deprived of correcting any abuse that may be involved.

The fact that here appellants were allowed on special occasion (R. 66) to leave the courtroom and consult their counsel only emphasizes the violation of their rights. It shows that Mr. Justice Arkwright was evidently satisfied that they needed the guiding hand of counsel. That being so, he should have permitted representation in the courtroom where alone it could be effective. Outside, counsel is without direct knowledge of the course of proceedings. Appellants are not lawyers. They were under tension of an accusation of crime. They could not possibly inform counsel outside with the equivalent of his own hearing and seeing. Even so appellants were deprived of another benefit of having counsel present. The mere presence of counsel is assurance against oppression.

The instant cases fall squarely within the following portion of this Court's opinion in *Crooker* (p. 439):

> "Under these principles, state refusal of a request to engage counsel violates due process not only if the accused is deprived of counsel at trial on the merits, *Chandler* v. *Fretag, supra,* but also if he is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice'."

CONCLUSION

The orders of the New York Court of Appeals should be reversed and the contempt determinations and mandates made by Mr. Justice Arkwright should be annulled.

Respectfully submitted,

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SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1958

NO. 378

ANONYMOUS NOS. 6 AND 7

Appellants,

v.

HON. GEORGE A. ARKWRIGHT, as Justice of the Supreme Court of the State of New York,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLEE

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INDEX

Table of Cases

Statutes

Other Authorities

Supreme Court of the United States

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BRIEF FOR APPELLEE

NATURE OF PROCEEDING and OPINIONS BELOW

Appellants were subpoenaed to appear as witnesses in a preliminary fact finding inquiry or investigation ordered by the Appellate Division of the Supreme Court of the State of New York into alleged misconduct by attorneys and by other persons acting in concert with them. Appellants were adjudged guilty of a criminal contempt for refusing to answer questions at the inquiry Appellants based their refusal to answer on the sole ground that their

attorney was not permitted to be present in the hearing room during the interrogation (R. 7-15, 36-45).

Through the medium of a petition under Article 78 of the New York Civil Practice Act, appellants instituted a proceeding in the Appellate Division to review the determinations adjudging them in contempt. In a memorandum decision reported in 6 A. D. 2nd 719 (R. 138, 148), the Appellate Division unanimously confirmed the determinations and orders of contempt.

Appellants then sought to appeal as of right to the Court of Appeals of the State of New York pursuant to the provisions of Section 588, subdivision 1(a) of the Civil Practice Act. This statute permits an appeal as of right where a federal constitutional question is directly involved. Upon appellee's motion, the Court of Appeals unanimously dismissed the appeals "upon the ground that no substantial constitutional question is involved", 4 N. Y. 2nd 1034 (R. 159-162).

JURISDICTION

The jurisdiction of this court to review these cases by direct appeal is invoked by appellants under Title 28 U. S. C. § 1257, subdivision 2 (R. 163-174). Failing that, "appellants invoke this court to treat the papers as applications for writs of certiorari under 28 U. S. C., Section 2103" (Appellants' Brief, p. 4). Further consideration by this court of the question of jurisdiction was postponed to the hearing of the case on the merits (R. 174; 79 S. Ct. 151).

STATEMENT OF THE CASE

We believe that the question of jurisdiction and the constitutional issue of due process sought to be projected by the appellants can be better considered in the light of an

extended statement of the case. The material facts are not in dispute. The controversy before this court arises only by reason of the opposing views of counsel for the parties as to the applicability of any constitutional question.

The origin of the inquiry or investigation. The role of the Brooklyn Bar Association.

The investigation has its genesis in a petition * of the Brooklyn Bar Association sworn to December 11, 1956 and addressed to the Appellate Division of the Supreme Court of the State of New York, Second Department. As stated in its certificate of incorporation the purpose, among others, of the Brooklyn Bar Association is to elevate "the standard of integrity, honor and courtesy in the legal profession". Based on an investigation conducted by the Bar Association in 1956, the Association alleged in its petition to the Appellate Division that there was "solicitation by attorneys of their employment to prosecute damage cases on a contingent fee basis" with the following indicated results:

> "7. That such practices result in the following: unfair agreements of retainer; maintenance by lawyers of some system of obtaining prompt information of accidents; congestion of court calendars by unworthy causes which are never intended to be brought to trial; a false conception by lawyers engaged in this practice that the relationship between attorney and client is a commercial transaction in which the interest of the client plays an unimportant part; impairment of public confidence in the Courts; and delay in the administration of justice."

Accordingly, the Association "requested that a judicial inquiry be made into the practices alleged and into any

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* The petition is referred to in the order of the Appellate Division dated January 21, 1957 directing and authorizing the current inquiry (R. 27-29, 57-59).

other illegal or improper practices, and that upon the conclusion of such inquiry any person found to have been participating in any such practices be brought into court for such action as is contemplated by law."

The order of the Appellate Division directing a Judicial Inquiry and Investigation.

Acting upon the petition of the Brooklyn Bar Association, the Appellate Division made an order dated January 21, 1957 (R. 27-29, 57-59)* directing that a judicial inquiry and investigation be made:

> "(1) With respect to the alleged improper practices and abuses by attorneys and counselors-at-law in Kings County, and by persons acting in concert with them, as alleged in said petition;
>
> "(2) With respect to alleged corrupt and unethical practices, including the practice of solicitation in obtaining retainers and in the subsequent prosecution and disposition of claims and actions;
>
> "(3) With respect to any other practice involving professional misconduct, fraud, deceit, corruption, crime and misdemeanor, by attorneys and by others acting in concert with them; and
>
> "(4) With respect to any and all conduct prejudicial to the administration of justice by attorneys and others acting in concert with them;"

The order further provides that the investigation shall be conducted by Supreme Court Justice George A. Arkwright** at an Additional Special Term of the Supreme

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* The complete text of the Order is reproduced as Appendix A hereof.

** By reason of attaining the statutory age limit, Mr. Justice Arkwright retired on December 31, 1958. In his place the Appellate Division has designated Supreme Court Justice Edward G. Baker.

Court, aided by Denis M. Hurley, Esq., an attorney designated by the Brooklyn Bar Association.

Consistent with the provisions of Section 90, subd. 10 of the Judiciary Law, the order directs that the investigation shall be conducted in private.

Lastly, the order provides that the Justice conducting the inquiry shall file with the Appellate Division his report setting forth his proceedings, his findings and his recommendations.

To the foregoing we make the observation that nowhere in Section 90 is there any provision granting either a witness or a party under inquiry a right to have counsel present in the hearing room during interrogation. We shall discuss this at more length, *infra*.

Authority for the Investigation.

The authority of the Appellate Division to order the investigation is unchallenged. It is vested in the Court by statute (New York State Judiciary Law, Section 90).*

Subdivision 1(a) of Section 90 represents a broad grant of power to the Appellate Division to determine if a person possesses the requisite character and fitness for admission to the Bar.

Subdivision 2 of Section 90 authorizes the Appellate Division to censure, suspend from practice or remove from office any attorney "who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice".

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* The pertinent provisions of Section 90 of the Judiciary Law are quoted in Appendix B hereof.

Subdivision 6 of Section 90 provides that an attorney may not be suspended or removed until he has first been served with charges and he must be allowed an opportunity to defend himself. This subdivision also provides that the expenses of any preliminary investigation shall be paid by the appropriate government unit. With relation to the current inquiry, this means the City of New York.

Under subdivision 7 of Section 90, the duty to prosecute an attorney on charges of misconduct devolves upon the appropriate district attorney, when so designated by the Appellate Division, or upon an attorney approved by a Bar Association and thence appointed by the Appellate Division.

Subdivision 10 of Section 90 is designed to insure secrecy and privacy of the investigation.

To complement Section 90, the Appellate Division has promulgated special rules regulating the conduct of attorneys in its Judicial Department. For example, with respect to so-called "negligence cases" handled by the attorney on a contingent fee basis, Rule 3 requires the attorney to file a statement or notice of retainer with the Clerk of the Appellate Division setting forth, *inter alia*, the date of retainer, the terms of compensation, home address of the client, date of occurrence of injury, whether the client was personally known to the attorney and the name of any person who referred the client or who had any connection with referring the client to the attorney, stating the connection. Violation of the rules is deemed professional misconduct within the meaning of Section 90, subd. 2 of the Judiciary Law (Clevenger's Annual Practice of New York, 1958, Court Rules, pp. 21-18 to 21-19).

The Breadth and Scope of the Investigation.

In a preliminary report dated and filed June 11, 1958 with the Appellate Division, Mr. Justice Arkwright summarized the activities of the investigation to the date of the report. The full text of the report was published on page 1 of the New York Law Journal of June 23, 1958. Appellants have quoted parts of the report in their respective affidavits in the Court of Appeals (R. 149-158), and in their brief herein (page 7). So that this court may have a more complete picture of the different proceedings and activities of the investigative inquiry, the pertinent parts of Mr. Justice Arkwright's report are appended hereto as Appendix C.

The magnitude of the investigation is perhaps best reflected by some of the statistical data in Mr. Justice Arkwright's report. Quite apart from the diverse legal proceedings that ensued from the investigation, and the number of disciplinary proceedings that were recommended to be instituted against various attorneys, it appears that no less than 2,500 witnesses were screened by the Inquiry's investigative staff to June 11, 1958. Of these witnesses, 726 were questioned at some length before Mr. Justice Arkwright. To say that the progress of the Inquiry would have been delayed and the proceedings rendered unwieldy and ineffectual, if that many witnesses had been permitted the presence of counsel, would be to understate the case. We add this further practical consideration. To permit witnesses the presence of counsel in the hearing room would add unduly to the costs of the investigation. To date the recorded costs of the Inquiry exceed $400,000 payable by the City of New York (Judiciary Law, Section 90, subdivision 6).

The Appellants and Their Relation to the Investigation.

The stenographic record of the hearings during the investigation relating to the appellants is contained at

page 59 et seq. of the Record herein. As an aid to the court we shall seek to summarize the salient features of the preliminary hearings.

The appellants are New York State licensed private detectives and investigators doing business under the trade name of Gotham Claims Bureau (R. 61, 130, 140). Pursuant to subpoena, the appellants, accompanied by their attorney, appeared as witnesses before the Judicial Inquiry on December 4, 1957. Upon the request of their attorney, appellants were granted an adjournment of their scheduled examination before the Justice presiding at the Inquiry pending a decision by the Appellate Division in an entirely unrelated case on the question of the right of a witness to be attended by counsel in the Inquiry (R. 61, 110). After leaving the hearing room, appellants and their attorney informally inquired of an assistant counsel for the Inquiry as to the Inquiry's interest in the appellants (R. 110, 115). As a "favor" and "off the record" (R. 116), the assistant counsel explained the Judicial Inquiry's interest. This was explained in sworn testimony given by the assistant counsel. We quote from the Record (R. 115-116):

> "My recollection of the facts as they took place on December 4th was that following Mr. Zangara [attorney for the appellants] being before the Court and asking for an adjournment, that he and his clients approached me in the outer foyer outside the courtroom and Mr. Zangara, as spokesman for the group, asked me exactly what was wanted of his clients in tlfis matter. I, at that time, told Mr. Zangara that all—I don't know my exact language, but I indicated that we did not intend to pussyfoot with them, we were not trying to trap them in any manner, but that testimony and evidence had come before us in the course of our investigation that someone in the employ of the Gotham Claims Service had, with some frequency, obtained statements from de-

fendants, holding themselves out to be from the defendant's carrier and also holding themselves out to be from other agencies, and in one instance the district attorney's office. That our investigation had disclosed that these statements had been tampered with, and that it was relative to this that we wished to speak to them to find out if these statements were actually taken by the Gotham Claims Service, for what attorneys these statements were taken, and whether the tampering was done by them or their employees or at the direction of some attorney.

"I told Mr. Zangara that the interests of the Judicial Inquiry was primarily directed at the attorneys that they had done business with, that if they cooperated fully I felt that the Court would take that into consideration if something unethical had been done.

"I further stated that in my opinion there was prima facie evidence in the event that the clients decided to plead the Fifth Amendment, to refer this matter to the district attorney.

"I stated it was my opinion, I did not indicate that that would be done, I did not indicate that it was even being considered at the time. I was merely giving my opinion for which they had asked. I made it quite clear that this was all off the record, that they were asking what amounted to a favor, and I was being very frank and honest with them. And I was thanked for indicating to them what the picture was.

"That is to my knowledge the full extent of the conversation.

"In fact, I remember indicating that any final action on the matter would have to be on the part of your Honor and that the Appellate Division would finally rule as to what would actually be done.

"The Court: All right. Any questions?

"Mr. Zangara: No, your Honor."

Subsequent to the appearance of the appellants and their attorney before the Judicial Inquiry on December 4, 1957, the Appellate Division squarely held in the pending case (not involving these appellants) that the exclusion of counsel from the hearing room during interrogation was not a violation of any constitutional rights (*Matter of M. Anonymous v. Arkwright*, 5 App. Div. 2d, 790-792)*. Motion for leave to appeal from the decision of the Appellate Division was denied by the Court of Appeals on April 3, 1958 (4 N. Y. 2d 676).

On April 22, 1958—more than four months after they procured an adjournment of their scheduled examination—the appellants, with their attorney, again appeared at the Judicial Inquiry. At the very outset, both Mr. Justice Arkwright and Chief Counsel Denis M. Hurley advised the appellants and their attorney of the foregoing holding by the Appellate Division that there was no constitutional right to counsel during interrogation (R. 61, 64). And at another point the following colloquy took place with one of the appellants (R. 78):

> "The Court: Well you were informed here—your counsel was informed, and I so inform you again that that has been ruled upon by the Appellate Division, and that counsel at my direction may or may not be allowed in the room while a witness is being examined.
>
> "I have ruled here that in this case, and in all that have been before me, that counsel will not be allowed in the room while a witness is being examined.
>
> "I am telling you that and you may be guided accordingly now. You have your counsel, so you take your advice from your counsel. I assume you

* For the convenience of the court we reproduce the opinion of the Appellate Division as Appendix D hereof.

have gone over it very carefully with him. He is outside.

"The Witness: I haven't gone over it as carefully as I would have liked to.

"The Court: If you wish to go out, I will suspend for a few minutes and let you go out.

"The Witness: No, your Honor, because I understand that the United States Supreme Court has not ruled on it yet.

"The Court: All right, go ahead, Mr. Hurley. You don't wish to go out then?

"The Witness: No, sir."

Nevertheless, the appellants persisted in their refusal to answer a series of questions that were clearly within the scope of the inquiry. They persisted in such refusal even after being afforded full opportunity to confer with their counsel. Further, the appellants were advised time and again that they were subpoenaed to appear as witnesses—not as defendants—and that "Nobody is accused here of anything" (R. 63, 65-67, 72, 78, 87, 93, 96, 98, 101).

After the fruitless examination of appellants on April 22, 1958 they were directed to return with their attorney on April 24, 1958 (R. 83-84). The same results ensued on April 24. The appellants were asked in verbatim some of the very questions which had been asked of them on April 22 (R. 66-83, 96-99, 101-106). The questions generally sought to elicit information as to the type of work appellants did in their firm, Gotham Claims Bureau; whether such work was in the nature of conducting investigations for lawyers; whether appellants had done investigations for certain named attorneys (who were being investigated by the Judicial Inquiry); whether appellants had referred cases to those attorneys (R. 96-99, 101-106). Appellants refused to answer each of these questions, again

on the ground that they were being deprived of their alleged right to be represented by counsel in the hearing room. Appellee thereupon held each appellant in contempt of court (R. 99-100, 106-107). There ensued the litigation in the State courts and the appeal by the appellants to this court.

THE QUESTION ON THE MERITS

Quite apart from the question of jurisdiction, which we shall discuss under *POINT I* of our Argument, *infra*, the basic question is:

By virtue of the due process clause of the Fourteenth Amendment to the Federal Constitution, do the appellants have a constitutional right to counsel in the hearing room while they are being interrogated as witnesses in a non-adversary, non-prosecutorial, preliminary fact finding inquiry into alleged unethical practices of attorneys and others acting in concert with them?

A factual ingredient of the question is that in any event the appellants were granted permission to interrupt the examination, leave the hearing room, and receive the advice of their attorney as to the very questions asked of them during the examination.

We cannot let pass unnoticed appellants' concept of the questions involved as formulated by their counsel (Appellants' Brief, pp. 5-6). The question of the constitutionality of Section 90, subd. 10, of the Judiciary Law was never raised by the appellants nor passed upon in these cases by the State courts. We shall so demonstrate, *infra*.

SUMMARY OF ARGUMENT

In the state courts, the appellants did not raise or attack the constitutionality of Section 90 (subd. 10) of the Judiciary Law. Nor was the constitutionality of that statute construed or passed upon by the state courts in these cases. Accordingly, the statute is immune from any constitutional question before this court.

It is clear that the appellants were subpoenaed to appear as witnesses in a preliminary fact finding, non-adversary and non-prosecutorial inquiry. The Inquiry results in no final adjudication or determination affecting these appellants. By statute (Judiciary Law, § 90, subd. 10) the Inquiry is secret and confidential. Under such circumstances there is no denial of due process under the Fourteenth Amendment.

Matter of Groban, 352 U. S. 330, is dispositive of the constitutional questions sought to be projected by the appellants herein.

Although the appellants were not entitled to representation by counsel in the hearing-room—either by constitutional or statutory right—they were nevertheless afforded ample opportunity to consult with counsel so that their rights were fully preserved and protected at all stages of the Inquiry.

POINT I

This Court is without jurisdiction to pass upon the constitutionality of the New York Statute (Judiciary Law § 90, subd. 10). The appellants never raised or attacked the constitutionality of the statute in the state courts nor was the constitutionality of the statute ever passed upon or determined by the state courts in the cases at bar.

(1)

Appellants seek to invoke the jurisdiction of this court under Title 28 U. S. C. § 1257(2) as a direct appeal from a final judgment or order of the highest court of the state. In our view this much is certain on the question of jurisdiction. For the first time, appellants now contend that the New York Statute (Judiciary Law § 90, subd. 10) is unconstitutional in that it is allegedly repugnant to the due process clause of the Fourteenth Amendment (Appellants' Brief pp. 5-6). The vulnerability of appellants' position is that the question of the constitutionality of the New York Statute was never raised by them in the state courts nor was it ever passed upon or decided by the state courts in the cases at bar. The Record supports us in these assertions.

In their original petitions in the Appellate Division to review the orders adjudging them in contempt (R. 130, 140), neither appellant mentioned or referred in any way to § 90, subd. 10 of the Judiciary Law. Similarly, on their appeals to the Court of Appeals, the appellants were completely silent on the question of the constitutionality of the statute (R. 17-26, 47-56, 149-158). It is in this court that the appellants for the first time attack the constitutionality of the state statute. In that posture of the case, we submit that this court should deny jurisdiction. *Wilson* v. *Cook*, 327 U. S. 474, 480, 482.

(2)

In rather indirect fashion, counsel for the appellants states at page 3 and elsewhere in his Brief that Section 90, Sub. 10 of the Judiciary Law was expressly construed by the Appellate Division in "the companion case" of *Matter of M. Anonymous* v. *Arkwright*, 5 App. Div. 2d 790, leave to appeal denied in 4 N. Y. 2d 676. The case of *M. Anonymous* and the cases at bar are altogether unrelated. Concededly, both cases arose out of the same investigation. However, they do not thereby become "companion cases". The parties in both cases are different and each case was properly decided upon its own facts. The opinion in *M. Anonymous* was rendered by the Appellate Division on January 27, 1958; the opinions by the Appellate Division in the cases at bar were rendered on May 26, 1958. Nor may the case of *M. Anonymous* be treated as a "companion case" solely because the Appellate Division cited the authority of that case in its decisions dismissing the petitions of the appellants herein.

In any event, these appellants can derive no comfort from the case of *M. Anonymous*. There, as in the instant cases, the constitutionality of § 90, subd. 10 of the Judiciary Law was never passed upon nor was it ever presented for decision to the Appellate Division. Counsel for *M. Anonymous* recognized that such was the situation because he moved in the Court of Appeals for leave to appeal to that court from the Appellate Division decision (Civil Practice Act, Section 589), instead of appealing as of right on the ground that a constitutional question was involved (Civil Practice Act, Section 588). Accordingly, not by the remotest degree of kinship, can these appellants obtain a review of their cases in this court through their attempted adoption of the so-called "companion case" of *M. Anonymous*.

As stated by this court in *Federation of Labor* v. *McAdory*, 325 U. S. 450 (1945), it has long been the considered practice of the court not (p. 461) "to decide any constitutional question except with reference to the particular facts to which it is to be applied, *Hall* v. *Geiger-Jones Co.*, 242 U. S. 549, 554; *Corporation Comm'n* v. *Lowe*, 281 U. S. 431, 438; *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 372; *Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412, 429-30."

In *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282 (1921), this court similarly said (p. 289):

> "A statute may be invalid as applied to one state of facts and yet valid as applied to another."

On the jurisdictional feature, counsel for the appellants asserted on page 14 of his Brief that "The instant case is substantially similar" to *Matter of Groban*, 352 U. S. 330. That is manifestly not so. In the *Groban* case, there was a direct attack on the constitutionality of the Ohio statute in the courts of that state. The constitutionality of the New York statute (Judiciary Law § 90, subd. 10) was never attacked below.

POINT II

The due process clause of the Fourteenth Amendment does not give the appellants, as witnesses, the right to be represented by counsel in the hearing room while testifying in a preliminary fact finding investigation.

(1)

Purpose of inquiry; its characteristics.

Investigations or inquiries of the kind here involved are neither novel nor of recent vintage. Over the years, since 1928, there have been comparable inquiries into allegations of professional misconduct of lawyers. The inquiries have uniformly received judicial sanction. *Matter of Bar Association of the City of New York*, 222 App. Div. 580; *Matter of*

Brooklyn Bar Association, 223 App. Div. 149; *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465.

The question as to whether a witness in such an investigation has a constitutional right to have counsel physically present in the hearing room during the interrogation is dependent in a large measure upon the nature of the investigation and the purposes thereof. In our Statement of the Case, page 2 *et seq., ante*, we referred to some of the factors inherent in the instant investigation. For purposes of the immediate discussion we recapitulate the chief characteristics of the current inquiry:

(a) Inquiry shall be made into alleged improper, corrupt and unethical practices by attorneys and others acting in concert with them and "with respect to any and all conduct prejudicial to the administration of justice by attorneys and others acting in concert with them" (Order of the Appellate Division made January 21, 1957; Judiciary Law § 90; Appendix A and Appendix B hereof, respectively).

(b) The justice conducting the investigation shall make and file with the Appellate Division "his report setting forth his proceedings, his findings and his recommendations" (Last paragraph of Order of Appellate Division, *supra*). Thus, the role of the justice presiding over the investigation is that of a preliminary fact-finder. He is not a prosecutor. He may neither formulate nor prosecute any charges. This would be beyond the scope of the Appellate Division order. Indeed, in another case that was an outgrowth of the current investigation, the Appellate Division held that "The result of the inquiry and investigation as to petitioner would be merely a report and recommendation as to future action, and would not be a final determination as to him". *Matter of M. Anonymous*, 5 App. Div. 2d 790; Appendix D hereof.

(c) The investigation is not a criminal proceeding. *Matter of C. Anonymous*, 6 App. Div. 2d 1045.

(d) "For the purpose of protecting the reputation of innocent persons", the investigation shall be conducted in private, and all papers relating thereto, except upon order of the court, shall be deemed confidential (Appendix A and Appendix B hereof). In this respect the investigation is akin to a Grand Jury proceeding. *People ex rel. Karlin* v. *Culkin,* 248 N. Y. 465, 479.

In summary, an inquiry of the kind here involved has been denominated as a quasi-administrative, preliminary investigation, without adversary parties, neither ending in any decree nor establishing any right (*Karlin* case, *supra,* at p. 479). It is not a proceeding against any particular person; it is non-prosecutorial. Rather, it is a proceeding against an offending practice. *Rubin* v. *State,* 216 N. W. 513, 516; *Matter of Brooklyn Bar Association,* 223 App. Div. 149, 151.

(2)

Why appellants, as witnesses, were summoned to testify.

In the nature of things an investigation into the conduct of attorneys could not be effective if only those lawyers being investigated were called as witnesses. Others with relevant information, including non-lawyers, must also give testimony. That is why appellants were summoned to testify. In the investigation of certain lawyers, some of whose names appear on the record (R. 69, 75, 81, 82), information was discovered which indicated that appellants might be possessed of knowledge relevant to the investigation of those attorneys and perhaps others as well. The tampered statements seemed to be connected with appellants and appellants were summoned "* * * to find out if these statements were actually taken by the Gotham Claims Service (sic), *for what attorneys the statements were taken,* and whether the tampering was done by them or their employees or *at the direction of some attorney*" (R. 115; italics added). It is true that the Judicial Inquiry was interested in determining what appellants had done, but it is also true that it was more

interested in receiving their testimony in that regard because this might shed light on what had been done by attorneys under investigation.

(3)

Witnesses have no right to counsel.

In considering the appellants' asserted constitutional right to counsel, it must be borne in mind that they were sought to be questioned at the Inquiry solely in their capacity as *witnesses*. They were repeatedly apprised of that fact. For example, see R. 63, 72, 73, 87. The law is well established that appellants, as witnesses, have no right to counsel. *People ex rel. McDonald* v. *Keeler*, 99 N. Y. 463; *Matter of M. Anonymous*, 5 App. Div. 2d 790, leave to appeal denied 4 N. Y. 2d 676 (Appendix D hereof); *Matter of Groban*, 352 U. S. 330. In the *McDonald* case the Court of Appeals held a witness who had been subpoenaed before a legislative committee guilty of contempt for refusing to testify unless he was attended by counsel. In language that is particularly apt to the case at bar the Court of Appeals stated at pages 484-485:

> "His refusal to be further examined, or to remain in attendance, was placed upon the ground that the committee refused to recognize his right to be attended by counsel and act under his advice in answering questions, but we are of opinion that he had no constitutional or legal right to the aid of counsel on such examination. The constitutional provision on the subject is that 'in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions.' (Const., art. 1, § 6.) This provision has been very liberally construed and held to apply to trials before any authority having jurisdiction to try, and in *People ex rel. Mayor, etc.* v. *Nichols* (79 N. Y. 582), this court held that a police commissioner, appearing before the Mayor of the city of New York to show cause why he should not

be removed for cause, pursuant to the statute, was entitled to defend by counsel. But here the relator was not on trial, nor was he a party, but he was a mere witness called upon to testify in relation to charges against another person, and there was no trial pending against any one. As well might a witness, examined before a grand jury conducting an investigation of a charge against another person, with a view of his indictment, claim the right to be attended by counsel. We do not think that a mere witness has that right."

(4)

The expressed policy of New York State.

By act of the New York State Legislature in 1954, a witness summoned to a hearing before certain named agencies of the government, has been accorded the right to be accompanied by counsel (New York State Civil Rights Law, § 73).* However, the law does not encompass an investigation of the kind that is here involved. *Matter of M. Anonymous, supra.*

Legislative recognition of the inapplicability of Section 73 of the Civil Rights Law to the current Inquiry is not lacking. During the 1958 session of the New York State Legislature, a Bill was introduced in the Assembly (A. Int. 3210, Pr. 3347, Austin) to amend the State Civil Rights Law.** If enacted, the Bill would have granted the right of representation by counsel to persons called as witnesses "before any judge, arbitrator, referee or other person heretofore or hereafter authorized or directed to conduct any inquiry or investigation, whose testimony may tend to involve himself or any other person in any subsequent criminal or quasi-criminal prosecution or in any subsequent disciplinary proceeding for professional misconduct, or whose testimony may subject himself or any other person

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* The text of this statute is annexed as Appendix E.

** A copy of this Bill is annexed hereto as Appendix F.

to any forfeiture, fine, penalty, or the revocation or suspension of any license to engage in a profession, trade or business". The Bill, of course, would have applied to the instant investigation. The Bill failed of passage (New York State Legislative Record and Index, 1958, p. 617). At the moment, therefore, the public policy of the State of New York, expressed through the duly elected representatives of the people in the State Legislature, is that witnesses summoned to an inquiry such as the one here involved have no right to counsel. There may be those who disagree with the wisdom of such legislation or, rather, lack of legislation. However, and we believe quite properly, the "wisdom" of legislative policy does not come within the orbit of judicial adjudication of a constitutional issue.

(5)

The Groban case is dispositive of appellants' contentions.

We regard the decision of this court in *Matter of Groban*, 352 U. S. 330,* as decisively rejecting the very contentions advanced by the appellants herein. The features of both cases, insofar as they project a constitutional issue, are strikingly analogous. In the language of this court, the *Groban* proceeding "was not a criminal trial, nor was it an administrative proceeding that would in any way adjudicate appellants' responsibilities for the fire. It was a proceeding solely to elicit facts relating to the causes and circumstances of the fire. The Fire Marshal's duty was to 'determine whether the fire was the result of carelessness or design', and to arrest any person against whom there was sufficient evidence on which to base a charge of arson".

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* We point out that the *Groban* case has also been cited in a Federal district court as authority for the proposition that a person summoned to appear before the Judicial Inquiry is not entitled to be represented by counsel. *Matter of Anonymous*, Abruzzo, J., U. S. District Court, Eastern District of New York; New York Law Journal, June 23, 1958, p. 1.

We paraphrase the quoted language to the case at bar: "The proceeding before the justice conducting the Judicial Inquiry was not a criminal trial, nor was it an administrative proceeding that would in any way adjudicate appellants' responsibilities. It was a proceeding solely to elicit facts relating to the alleged misconduct of lawyers and others acting in concert with them. The duty of the justice conducting the Judicial Inquiry was merely to ascertain the facts relating to any misconduct of lawyers or of others acting in concert with them".

We submit that the analogy needs no further comment.

We quote further from the majority opinion in the *Groban* case solely because it is so apposite to the situation in the instant case:

> "The fact that appellants were under a legal duty to speak and that their testimony might provide a basis for criminal charges against them does not mean that they had a constitutional right to the assistance of their counsel. Appellants here are witnesses from whom information was sought as to the cause of the fire. A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, nor can a witness before other investigatory bodies. There is no more reason to allow the presence of counsel before a Fire Marshal trying in the public interest to determine the cause of a fire. Obviously in these situations evidence obtained may possibly lay a witness open to criminal charges. When such charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defense. Until then his protection is the privilege against self-incrimination."

The principal basis for appellants' contention that they were entitled to be represented by counsel while being examined as witnesses in the Inquiry, is that they faced imminent peril of prosecution for crime (Appellants' Brief, pp. 9, 18, 20). Such apprehensiveness or fear of the appel-

lants is predicated upon a statement by an assistant counsel for the Inquiry made to the appellants and in the presence of their attorney (as a "favor" and "off the record"!)—more than four months before the appellants refused to answer questions in the absence of counsel (R. 109-113, 115-116). What the appellants overlook is that they were repeatedly advised during the investigation that they were not being charged with anything; that they were not defendants, and that they were merely present as witnesses (R. 63, 65-67, 72, 78, 87, 93, 96, 98, 101). In this connection, we repeat solely for emphasis, that the function of the justice presiding at the Inquiry was confined to eliciting the facts and transmitting his findings and recommendations to the Appellate Division. No final adjudication could be made by the justice presiding at the Inquiry as to the responsibility of the appellants. Moreover, in the *Groban* case, the Fire Marshal was empowered to arrest "any person against whom there was sufficient evidence on which to base a charge of arson". The justice presiding at the Judicial Inquiry had no comparable power to arrest the appellants except for the unchallenged power to punish them for contempt for their refusal to answer the questions within the conceded scope of the Inquiry.

In view of this court's holding in the *Groban* case, and in the light of the procedures applicable to the Judicial Inquiry, the appellants' fear of "imminent peril" is indeed illusory.

(6)

In any event, appellants were afforded full opportunity to confer with counsel.

We make this final observation. Appellants argue as if they were denied, in an absolute sense, their asserted right to counsel. On the contrary, all that the appellants were denied was the physical presence of their counsel in the hearing room during interrogation. They were not

denied, at any stage—even as to why they should not be punished for contempt (R. 84)—the privilege to confer with and obtain the advice of their counsel, who was accessible to them by reason of being immediately outside the hearing room.*

By way of illustration, we quote from the record:

> "The Court [addressing counsel for appellants]: Your client wishes to say something to you, and he wants to speak, but you represent him, and I will hear you after you have consulted with him.
>
> (Mr. Zangara and Mr. Percudani consulted in the rear of the courtroom.)
>
> The Court: All right, Mr. Zangara, you have been talking with your client now.
>
> Mr. Zangara: He has advised me that he does not wish to testify without the presence of an attorney representing him.
>
> The Court: That has been ruled on by the Courts.
>
> Mr. Zangara: I understand that. I told him to take the stand and to make that clear to your Honor (R. 65)
>
> * * *
>
> The Court [addressing one of the appellants]: I don't want anything off the record. You may go out and consult counsel.
>
> (The witness retired from the courtroom and later returned.)
>
> * * *
>
> Q. Mr. Percudani [one of the appellants], you left the courtroom and conferred with your attorney.
>
> The Court: You have conferred with your attorney?

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* We do not deem it amiss to quote here from the report of Mr. Justice Arkwright filed with the Appellate Division (Appendix C annexed hereto). Mr. Justice Arkwright stated:—"We have been scrupulous in apprising all attorneys of the stated purposes of the Inquiry as laid down by the Appellate Division, and witnesses, whenever required, have been advised of their constitutional rights."

The Witness: Yes. Upon conferring with my attorney, sir, I will still have to state that without counsel being present I cannot answer any questions, sir." (R. 66-67)

• • •

The Court [addressing one of the appellants]: Well, you were informed here—your counsel was informed, and I so inform you again that that has been ruled upon by the Appellate Division, and that counsel at my direction may or may not be allowed in the room while a witness is being examined.

I have ruled here that in this case, and in all that have been before me that counsel will not be allowed in the room while a witness is being examined.

I am telling you that and you may be guided accordingly now. You have your counsel, so you take your advice from your counsel. I assume you have gone over it very carefully with him. He is outside.

The Witness: I haven't gone over it as carefully as I would have liked to.

The Court: If you wish to go out, I will suspend for a few minutes and let you go out.

The Witness: No, your Honor, because I understand that the United States Supreme Court has not ruled on it yet.

The Court: All right, go ahead, Mr. Hurley. You don't wish to go out then?

The Witness: No, sir" (R. 78).

• • •

The Court [addressing one of the appellants]: May I say, if you wish at any time to consult counsel, you are free to do so after the question is asked, or after I direct you, whichever you want to do (R. 98).

• • •

The Court [addressing one of the appellants and his counsel]: You understand you are not here as a defendant. You are merely here as a witness. We are going to ask him some of the questions that were

asked before and if he wishes to consult you, we will give him every opportunity to do so at any time during the questioning or any time that I direct'' (R. 101).

Thus it affirmatively appears that at no time were appellants deprived of any constitutional right. On the contrary, the Additional Special Term was indulgent beyond the requirements of law in affording them every opportunity to seek and to obtain the advice of their attorney.

CONCLUSION

The appeal should be dismissed, certiorari denied, and the orders of the New York Court of Appeals affirmed, with costs.

February 26, 1959.

Respectfully submitted,

DENIS M. HURLEY,
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Office and Post Office Address,
Borough Hall,
Brooklyn 1, New York.

MICHAEL A. CASTALDI,
MICHAEL CAPUTO,
of Counsel.

APPENDIX A

Order of the Appellate Division Dated January 21, 1957 Authorizing a Judicial Inquiry and Investigation

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 21st day of January, 1957.

Present:

HON. GERALD NOLAN, *Presiding Justice*
" HENRY G. WENZEL, JR.,
" GEORGE J. BELDOCK,
" CHARLES E. MURPHY,
" HENRY L. UGHETTA, *Associate Justices.*

IN THE MATTER OF THE PETITION OF THE BROOKLYN BAR ASSOCIATION FOR A JUDICIAL INQUIRY BY THE COURT INTO CERTAIN ALLEGED ILLEGAL, CORRUPT AND UNETHICAL PRACTICES AND OF ALLEGED CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE, BY ATTORNEYS AND COUNSELORS-AT-LAW AND BY OTHERS ACTING IN CONCERT WITH THEM IN THE COUNTY OF KINGS.

A petition having been presented to this court by the Brooklyn Bar Association alleging that certain attorneys and counselors-at-law, and other persons acting in concert with them, are or may be or were or may have been engaged in illegal, corrupt or unethical practices, and in conduct prejudicial to the administration of justice, as set forth in said petition, and praying for a judicial inquiry with respect thereto;

Appendix A—Order of the Appellate Division Dated January 21, 1957 Authorizing a Judicial Inquiry and Investigation

NOW, THEREFORE, pursuant to the authority vested in this court by the State Constitution (Art. VI, Sec. 2) and by statute (Judiciary Law, Sections 90, 86), it is hereby:

ORDERED, that a judicial inquiry and investigation be and they hereby are directed to be made:

(1) With respect to the alleged improper practices and abuses by attorneys and counselors-at-law in Kings County, and by persons acting in concert with them, as alleged in said petition;

(2) With respect to alleged corrupt and unethical practices, including the practice of solicitation in obtaining retainers and in the subsequent prosecution and disposition of claims and actions;

(3) With respect to any other practice involving professional misconduct, fraud, deceit, corruption, crime and misdemeanor, by attorneys and by others acting in concert with them; and

(4) With respect to any and all conduct prejudicial to the administration of Justice by attorneys and others acting in concert with them; and it is further

ORDERED, that such inquiry and investigation shall be conducted by the Honorable George A. Arkwright, a Justice of the Supreme Court, at a Special Term of the Supreme Court, County of Kings, with full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records; and it is further

ORDERED, that, for the purpose of conducting said inquiry and investigation, an additional Special Term of the

Appendix A—Order of the Appellate Division Dated January 21, 1957 Authorizing a Judicial Inquiry and Investigation

Supreme Court, in and for the County of Kings, be and it hereby is appointed to be held, commencing January 22, 1957, at the Court House in Brooklyn, New York, and that Mr. Justice George A. Arkwright, be and he hereby is assigned to hold such Special Term; and it is further,

ORDERED, that Denis M. Hurley, Esq., an attorney and counselor-at-law, of 32 Court Street, Brooklyn, New York who has been duly designated by the Brooklyn Bar Association, be and he hereby is designated to aid the said Justice in the conduct of said inquiry and in the prosecution of said investigation, pursuant to the provisions of the Judiciary Law (Section 90; subdivisions 6 and 7), it is further

ORDERED, that, for the purpose of protecting the reputation of innocent persons, the said inquiry and investigation shall be conducted in private, pursuant to the provisions of the Judiciary Law (Section 90, Subdivision 10); that all the facts, testimony and information adduced, and all papers relating to this inquiry and investigation, except this order, shall be sealed and be deemed confidential; and that none of such facts, testimony and information and none of the papers and proceedings herein, except this order, shall be made public or otherwise divulged until the further order of this court; and it is further

ORDERED, that upon the conclusion of said inquiry and investigation the said Justice shall make and file with this court his report setting forth his proceedings, his findings and his recommendations.

Enter:

GERALD NOLAN,
Presiding Justice.

APPENDIX B

Section 90 of the Judiciary Law

(Pertinent Provisions)

§ 90. *Admission to and removal from practice by appellate division; character committees*

1. a. Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counselor-at-law, shall admit him to practice as such attorney and counselor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

* * *

2. The supreme court shall have power and control over attorneys and counselors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counselor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

* * *

6. Before an attorney or counselor-at-law is suspended or removed as prescribed in this section, a copy of the

charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense. In all cases where the charges are served in any manner other than personally, and the attorney and counselor-at-law so served does not appear, an application may be made by such attorney or in his behalf to the presiding justice of the appellate division of the supreme court to whom the charges were presented at any time within one year after the rendition of the judgment, or final order of suspension or removal, and upon good cause shown and upon such terms as may be deemed just by such presiding justice, such attorney and counselor-at-law must be allowed to defend himself against such charges.

The presiding justice of the appellate division to which charges of professional misconduct against an attorney and counselor-at-law have been presented, may make an order directing the expenses of such proceedings, and the necessary costs and disbursements of the petitioner in prosecuting such charges, including also in a county wholly within a city or in a county having a population of over one hundred sixty thousand inhabitants, the expense of a preliminary investigation in relation to such charges, to be paid by the county treasurer of a county within the judicial department, which expenses shall be a charge upon such county.

7. It shall be the duty of any district attorney within a department, when so designated by the presiding justice of the appellate division of the supreme court, to prosecute all proceedings for the removal or suspension of attorneys

and counselors-at-law or the said presiding justice may, in a county wholly included within a city or in a county having a population of over three hundred thousand inhabitants, appoint an attorney and counselor-at-law, designated by a duly incorporated bar association approved by him, to prosecute any such proceedings and, upon the termination of the proceedings, may fix the compensation to be paid to such attorney and counsellor-at-law for the services rendered under such designation, which compensation shall be a charge against the county specified in his certificate and shall be paid thereon.

* * *

10. Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counselor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records.

APPENDIX C

Pertinent Excerpts from Report of Mr. Justice Arkwright Filed in the Appellate Division on June 11, 1958 and Published in the New York Law Journal of June 23, 1958

APPELLATE DIVISION

SECOND DEPARTMENT

REPORT OF SUPREME COURT JUSTICE ARKWRIGHT ON THE JUDICIAL INQUIRY AND INVESTIGATION BEING CONDUCTED AT ADDITIONAL SPECIAL TERM

Supreme Court Justice George A. Arkwright has submitted to the Appellate Division, Second Department, a preliminary report of the activities and accomplishments to date of the judicial inquiry and investigation being conducted by the Additional Special Term of the Supreme Court, Kings County. The full text of the report, which is dated June 11, 1958, and addressed to Presiding Justice Gerald Nolan, follows:

• • •

The magnitude of the task facing our staff can be observed from the fact that during the years 1953-1957, inclusive, 122,933 statements of retainer were filed for Kings County alone with the Appellate Division, mostly in negligence cases. It is significant to note that the number of these statements filed for Kings County increased each succeeding year as follows: 18,527 (1953); 20,535 (1954); 23,367 (1955); 26,667 (1956); 33,837 (1957). Percentagewise, these figures show a huge increase of 82.5% from 1953 to 1957. Moreover, the increase during the year (1957) that the Judicial Inquiry commenced its operations over the previous year (1956) was 23%. In order to spot-check even a small sampling of this large backlog of cases, by calling only one or two witnesses and reviewing the file in each case, a tremendous task was involved.

• • •

Appendix C—Pertinent excerpts from Report of Mr. Justice Arkwright Filed in the Appellate Division on June 11, 1958 and Published in the New York Law Journal of June 23, 1958

Some idea of the breadth and scope of the investigation being conducted may be gleaned from the facts and figures that follow.

The conduct and practices of 28 attorneys have been thoroughly investigated to date. Under dates of December 11, 1957, January 29, 1958, March 26, 1958 and May 23, 1958, I submitted intermediate reports on 14 of these attorneys and I expect to submit to your Honorable Court on or before July 1st of this year reports dealing with the remaining 14 attorneys. In each instance, my report on an attorney sets forth the proceedings had, my findings of fact and my recommendations for action by the Appellate Division.

The Judicial Inquiry issued 4,875 request subpoenas to witnesses from March, 1957, to date. A total of 4,422 persons appeared at the Judicial Inquiry and signed the visitor's book.

Personal subpoenas and subpoenas duces tecum were served upon 2,150 persons and approximately 5,000 insurance company files were subpoenaed and reviewed. The files of other defendants, such as the City of New York and the Transit Authority, have also been examined. But most of the claims made and actions commenced are against defendants represented by casualty insurance companies.

The staff of the Judicial Inquiry has examined in private session about 2,500 witnesses between March, 1957, and the present date, taking statements under oath from 1,364 of these persons.

Since May 1, 1957, 726 witnesses were examined at length before me at the Additional Special Term.

We have been scrupulous in apprising all attorneys of the stated purposes of the Inquiry as laid down by the Appellate Division, and witnesses, whenever required, have been advised of their constitutional rights.

Appendix C—Pertinent excerpts from Report of Mr. Justice Arkwright Filed in the Appellate Division on June 11, 1958 and Published in the New York Law Journal of June 23, 1958

As many as 30 persons sworn as witnesses before the Additional Special Term have, as is their unquestioned right, invoked their constitutional privilege against self-incrimination, including 11 attorneys and 10 doctors. Faced with this roadblock, Counsel for the Inquiry has been forced to develop and to present independent evidence of the facts.

The financial records of attorneys, physicians, public adjusters, insurance adjusters, collision repairmen and many others have been audited by our accountants. At the present time, the books of numerous other persons are being audited. Some attorneys have refused to produce any of their financial records and have made application to the courts to quash the subpoenas served upon them.

We regret exceedingly to be compelled to state that a sordid picture of unethical, unlawful and sometimes criminal practices by certain attorneys and persons acting in concert with them has been developed. Unlawful patterns of solicitation of cases have involved collaboration between attorneys, doctors, auto body repairmen, insurance brokers and other persons. A great number of instances of collusion between attorneys and doctors to defraud insurance carriers by the issuance of forged or fraudulent and exaggerated medical certificates and medical bills have been uncovered. Similarly, a large number of cases involving false and exaggerated loss of earnings statements submitted to such carriers have been brought to light. Evidence has also been adduced with regard to widespread unlawful and unprofessional attempts to influence and to corrupt employees and others associated with insurance carriers in the processing of liability claims. The evidence in the investigation to date, encompassing approximately 3,000 negligence cases, establishes frauds totaling many millions of dollars upon these carriers and their policyholders.

• • •

Appendix C—Pertinent excerpts from Report of Mr. Justice Arkwright Filed in the Appellate Division on June 11, 1958 and Published in the New York Law Journal of June 23, 1958

Upwards of 60 attorneys have thus far represented and appeared as counsel for numerous witnesses called to testify at the Additional Special Term, many of them being distinguished members of the Bar. A number of these attorneys have appeared for different witnesses on different occasions.

Never in any prior similar investigation in New York State have so many witnesses been represented by so many and by such distinguished counsel. These attorneys have been most zealous in the protection of the rights of their clients and they have, as is their right, raised almost every conceivable legal and constitutional question. What is most disconcerting, however, is that while these witnesses—especially professional people, lawyers and doctors—are so well versed in their rights they seem to have no conception of their professional duties and civic responsibilities.

Some of the questions posed by counsel have involved a claimed right to have counsel present in the courtroom during the examination of a witness; the Judicial Inquiry's right to call non-attorneys as witnesses; the right of the Additional Special Term to grant a witness immunity from prosecution; the permissible scope of subpoenas duces tecum issued by the Judicial Inquiry within the constitutional privilege against unreasonable searches and seizures; the relevance of documents called for in these subpoenas duces tecum; whether all motions and applications arising from the Judicial Inquiry should be made in the first instance before the Additional Special Term; the jurisdiction of the Judicial Inquiry to investigate attorneys who, although practicing law, in the sense of trying cases in the courts of Kings County, neither reside nor maintain their offices in this County, as well as numerous other pertinent questions of law.

* * *

Appendix C—Pertinent excerpts from Report of Mr. Justice Arkwright Filed in the Appellate Division on June 11, 1958 and Published in the New York Law Journal of June 23, 1958

Applications for relief have been made in the Court of Appeals, in the Appellate Division, in the Additional Special Term, in Special Term, Part I (Supreme Court, Kings County), and in the United States District Court for the Eastern District of New York. The proceedings under Article 78 were all initiated in the Appellate Division and to the New York Court of Appeals. The two equity actions for injunctive relief were brought in the United States District Court for the Eastern District of New York, an attorney and a doctor claiming that they had been deprived of due process under the Fourteenth Amendment to the Constitution of the United States by Mr. Hurley and by me, named as the defendants.

• • •

It is next to impossible to state in succinct form the work and accomplishments of the Judicial Inquiry to date. Yet, it is self-evident from this short summary that the past year and a half has been an active and trying period for the Judicial Inquiry. We believe, despite all the legal delays, that it has also been a productive period. The revelations before the Additional Special Term of corruption in a certain segment of the Bar have been highly disturbing. However, it is our hope that the continuance of the much-needed task will make it possible for the legal profession to clean its own house of certain disreputable members, thereby serving not only the best interests of the legal profession but freeing the public, and all those who have been paying unjust tribute, from the depredations of that unscrupulous minority which confuses its lofty status at the Bar with unbridled license to defraud and to corrupt for personal gain.

APPENDIX D

Opinion in *Matter of M. Anonymous v. Arkwright*, 5 App. Div. 2d 790, Leave to Appeal Denied in 4 N. Y. 2d 676

In the Matter of M. Anonymous, Petitioner against George A. Arkwright, as Justice of the Supreme Court of the State of New York, respondent. —By an order of this court dated January 21, 1957, as amended by subsequent order, dated February 11, 1957, a judicial inquiry and investigation was directed with respect to the improper practices and abuses by attorneys in Kings County and by persons acting in concert with them, as alleged in the petition of the Brooklyn Bar Association. In part, the order directed inquiry with respect to practices "involving professional misconduct, fraud, deceit, corruption, crime and misdemeanor, by attorneys and by others acting in concert with them" and with "respect to any and all conduct prejudicial to the administration of justice by attorneys and others acting in concert with them". The order appointed an additional Special Term of the Supreme Court to conduct the inquiry and investigation and provided that the inquiry and investigation shall be conducted by a named Justice of the Supreme Court, "with full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records". An attorney nominated by the Brooklyn Bar Association was designated to aid the said Justice in the conduct of the inquiry and in the prosecution of said investigation. The order also provided that "for the purpose of protecting the reputation of innocent persons, the said inquiry and investigation shall be conducted in private, pursuant to the provisions of the Judiciary Law (Section 90, subdivision 10); that all the facts, testimony and information adduced, and all papers relating to this inquiry

and investigation, except this order, shall be sealed and be deemed confidential; and that none of such facts, testimony and information and none of the papers and proceedings herein, except this order, shall be made public or otherwise divulged until the further order of this court" and "that upon the conclusion of said inquiry and investigation the said Justice shall make and file with the court his report setting forth his proceedings, his findings and his recommendations." On or about July 19, 1957 petitioner submitted to this court his resignation as an attorney and counsellor-at-law, but no order has been entered upon his purported resignation. Pursuant to subpoena, petitioner attended at the additional Special Term, was sworn and refused to answer certain questions. By this proceeding pursuant to article 78 of the Civil Practice Act, petitioner seeks to review the order of the additional Special Term adjudging him guilty of contempt and fining him $250. No issue is raised as to whether the review of the contempt order by an article 78 proceeding is proper. Determination unanimously confirmed, without costs. The fine provided for in the order is to be paid within 30 days from the entry of the order hereon. Petitioner challenges the power and jurisdiction of the Appellate Division to make the order, and the power and jurisdiction of the additional Special Term to conduct the investigation as to him, as he had resigned from the Bar. He did not refuse to answer on the ground that his answers might tend to incriminate him. He reserves the alleged constitutional rights to refuse to answer questions (N. Y. Const., art. I, §§ 6, 12; U. S. Const., 4th, 5th Amdts.) and based his refusal to answer on the ground that the additional Special Term excluded his attorney while he was being questioned. It was within the power and jurisdiction of this court to make the order directing the inquiry and investigation (N. Y. Const., art. VI, § 2; Judiciary Law, §§ 86, 90; *Matter of Bar Assn. of*

Appendix D—Opinion in Matter of M. Anonymous v. Arkwright, 5 App. Div. 2d 790, Leave to Appeal Denied in 4 N. Y. 2d 676

City of N. Y., 222 App. Div. 580; *Matter of Brooklyn Bar Assn.*, 223 App. Div. 149; *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465), and petitioner was required to answer questions as to his conduct as an attorney, subject to his right to refuse to answer such questions if his answers would expose him to punishment for crime. In its discretion the additional Special Term might have permitted petitioner's attorney to be present while petitioner was being questioned, since it is clear that he was not merely a witness as to improper conduct of others but was himself a subject of the inquiry as to his own alleged acts of professional misconduct. But the result of the inquiry and investigation as to petitioner would be merely a report and a recommendation as to future action, and would not be a final determination as to him. It was not an abuse of discretion for the additional Special Term to exclude petitioner's attorney from the room while petitioner was being questioned, nor was it a violation of his constitutional rights (*People ex rel. McDonald* v. *Keeler*, 99 N. Y. 463; *Matter of Groban*, 352 U. S. 330; Judiciary Law, § 90). Section 73 of the Civil Rights Law is not applicable to this inquiry and investigation. Since petitioner based his refusal to answer on invalid grounds, he was properly found guilty of contempt (*People* v. *Berson*, 308 N. Y. 918). A person is not absolved of willful wrongdoing because he relied on his attorney's advice (*People* v. *Marcus*, 261 N. Y. 268), or on his own belief as to the law. Here the intent to defy the dignity and authority of the court on invalid grounds is clear (see, e.g., Matter of *Berkon* v. *Mahoney*, 268 App. Div. 825, affd. 294 N. Y. 828; *People* v. *Berson*, *supra*). The papers and records shall be sealed and deemed private and confidential, and no one shall have access to them without further order of this court or of the additional Special Term. Present—Wenzel, Acting P. J., Beldock, Murphy, Ughetta, and Kleinfeld, JJ.

APPENDIX E

Section 73 of the New York State Civil Rights Law

(Pertinent Provisions)

§ 73. Code of fair procedure for investigating agencies

1. As used in this section the following terms shall mean and include:

(a) "Agency". A standing or select committee of either house of the legislature or a joint committee of both houses; a duly authorized subcommittee of any such legislative committee; the commissioner of investigation acting pursuant to section eleven of the executive law; a commissioner appointed by the governor acting pursuant to section six of the executive law; the attorney general acting pursuant to subdivision eight of section sixty-three of the executive law; and any temporary state commission or any duly authorized subcommittee thereof which has the power to require testimony or the production of evidence by subpoena or other compulsory process in an investigation being conducted by it.

(b) "Hearing". Any hearing in the course of an investigatory proceeding (other than a preliminary conference or interview at which no testimony is taken under oath) conducted before an agency at which testimony or the production of other evidence may be compelled by subpoena or other compulsory process.

(c) "Public hearing". Any hearing open to the public, or any hearing, or such part thereof, as to which testimony or other evidence is made available or disseminated to the public by the agency.

(d) "Private hearing". Any hearing other than a public hearing.

2. No person may be required to appear at a hearing or to testify at a hearing unless there has been personally

served upon him prior to the time when he is required to appear, a copy of this section, and a general statement of the subject of the investigation. A copy of the resolution, statute, order or other provision of law authorizing the investigation shall be furnished by the agency upon request therefor by the person summoned.

3. A witness summoned to a hearing shall have the right to be accompanied by counsel, who shall be permitted to advise the witness of his rights, subject to reasonable limitations to prevent obstruction of or interference with the orderly conduct of the hearing. Counsel for any witness who testifies at a public hearing may submit proposed questions to be asked of the witness relevant to the matters upon which the witness has been questioned and the agency shall ask the witness such of the questions as it may deem appropriate to its inquiry.

* * *

APPENDIX F

Proposed Legislation to Amend the New York State Civil Rights Law, Which Failed of Passage

STATE OF NEW YORK

No. 3347 Int. 3210

IN ASSEMBLY

February 11, 1958

Introduced by MR. AUSTIN—read once and referred to the Committee on Judiciary

AN ACT

TO AMEND THE CIVIL RIGHTS LAW, IN RELATION TO THE RIGHT OF REPRESENTATION BY COUNSEL OF PERSONS CALLED AS WITNESSES IN CERTAIN INQUIRIES AND INVESTIGATIONS

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The civil rights law is hereby amended by inserting therein a new section, to be section twelve-a, to read as follows:

§ 12-a. Right of representation by counsel of persons called as witnesses in certain inquiries and investigations. Any person called as a witness by or before any legislative, executive or judicial investigating committee, commission or other agency, or by or before any judge, arbitrator, referee or other person heretofore or hereafter authorized or directed to conduct any inquiry or investigation, whose testimony may tend to involve himself or any other person in any subsequent criminal or quasi-criminal prosecution or in any subsequent disciplinary proceeding for profes-

sional misconduct, or whose testimony may subject himself or any other person to any forfeiture, fine, penalty, or the revocation or suspension of any license to engage in a profession, trade or business, shall have the right to be accompanied by his counsel who shall be entitled on behalf of his client to (a) object to the jurisdiction of the committee, commission, agency, judge, arbitrator, referee or other person conducting such inquiry or investigation and to argue briefly thereon; (b) to confer privately with his client to advise him of his legal rights whenever his client requests such a conference; (c) to object to procedures deemed by him to violate his client's legal rights; and (d) question the witness on his behalf, at the conclusion of his direct testimony, on any matter relevant to the subject of the inquiry or investigation, subject to such reasonable limitations as may be imposed by the officer presiding at such inquiry or investigation.

§2. This act shall take effect immediately.

Explanation—Matter in *italics* is new; matter in brackets [] is old law to be omitted.